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In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion by failing to dismiss a water rights adjudication in favor of a subsequently-initiated state administrative proceeding, where the federal adjudication is restricted to a declaration of the relative priorities of federally-derived water rights and where the state proceeding has not shown any tangible progress in the eight years since the motion to dismiss was filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37-95) is reported at 723 F.2d 1394. The opinion of the district court (Pet. App. 1-36) is reported at 478 F. Supp. 336.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1983. A timely petition for rehearing was denied on January 24, 1984. The petition for a writ of certiorari was filed on April 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1864, the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians¹ entered into a treaty with the United States, by which the Indians ceded the bulk of their ancestral lands in return for a reservation in Oregon on the east side of the Cascade Range. 16 Stat. 707. That reservation encompassed most of the course of the Williamson River, a tributary of the Klamath River, which arises in Klamath County, Oregon, and ultimately flows southward where it empties into Upper Klamath Lake. Approximately halfway down its course, and above the "reef" at Kirk, Oregon,² the Williamson River fans out as it enters a valley known as Klamath Marsh, a site historically important to the Indians for hunting, fishing, trapping, and gathering. (Pet. App. 39-40.)

In the years following the establishment of the reservation, the Indians continued to exercise subsistence hunting, fishing and gathering rights as recognized by Article I of the 1864 Treaty. In addition, as contemplated by Article VI of the Treaty, certain lands within the reservation were allotted to individual Indians. Some of these allotted lands passed into non-Indian ownership.

2. In 1954, Congress passed the Klamath Termination Act, later amended, 25 U.S.C. 564 *et seq.*, "to provide for the termination of Federal supervision over the trust and restricted property of the Klamath

¹ For convenience, all of the 1864 Treaty Indians will be collectively referred to as the "Klamath Indians" or "Klamath Tribe."

² The Kirk "reef", over which the Williamson River flows, is a natural rock formation immediately downstream from Klamath Marsh.

Tribe *** and of the individual members thereof [and] for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians ***." Section 14 of the Termination Act, 25 U.S.C. 564m, however, provided that the statute would not abrogate any water rights of the Tribe or its members and that state laws regarding the abandonment of water rights would not apply for 15 years following termination. Section 14 also stated that the Act would not abrogate any treaty-protected fishing rights or privileges. Finally, by subsequent amendments, Act of Aug. 23, 1958, Pub. L. No. 85-731, 72 Stat. 816 *et seq.*, Act of Sept. 9, 1959, Pub. L. No. 86-247, 73 Stat. 477 *et seq.*, the Termination Act provided that the Tribe's beneficial interest in portions of the lands comprising Klamath Marsh and the Indians' forest lands would be taken by the United States in return for monetary payment.

The termination process was carried out as prescribed by the Act. In 1961, the Secretary of the Interior published a proclamation in the Federal Register terminating federal supervision over the Tribe and its members (Pet. App. 94, n.26). The federally-owned lands in Klamath Marsh now comprise the Klamath Forest National Wildlife Refuge under the administration of the Department of the Interior. In addition, the bulk of the former reservation forest lands are now administered by the Department of Agriculture as part of the Winema National Forest. While federal supervision over the Tribe has terminated, the Indians' hunting and fishing rights, recognized by Article I of the 1864 Treaty, continue in force. *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974).

3. On September 29, 1975, the United States commenced this action by filing a complaint naming as defendants all persons and entities "claiming any right to the use of water within the watershed of the upper Williamson River" above the Kirk "reef."³ The complaint stated that all of the defendants were believed to claim interests in lands within the former Klamath Reservation and had acquired those interests directly, or through mesne conveyances, from the United States as trustee for the Tribe or from individual members of the Tribe to whom lands had been allotted. The government sought, among other things, a judgment declaring the relative rights of the defendants and the United States to utilize the surface and ground waters of the Upper Williamson River. The Klamath Tribe intervened on the side of the United States while the State of Oregon intervened as a defendant.

On December 23, 1975, the Water Resources Director of the State of Oregon signed⁴ a notice stating that he would, on September 1, 1976, begin "an investigation of the flow and use of the waters of the Klamath River and its tributaries, pursuant to the provisions of ORS 539.020 * * *." (Pet. App. 115-117.) The notice expressly included water rights claimed with respect to lands within the former Klamath Reservation and directed all water rights claimants to file, by October 1, 1976, "a written noti-

³ Petitioners erroneously assert (Pet. 3) that the action was initiated under the McCarran Amendment, 43 U.S.C. 666. In fact, the government's complaint alleged district court jurisdiction under 28 U.S.C. 1845.

⁴ Although the notice was dated December 23, 1975 (Pet. App. 117), it was apparently not published until January 15, 1976 (see Pet. 8).

fication of intention to file a claim, as provided by ORS 539.030." (*Ibid.*).

Thereafter, beginning on May 6, 1976, the State and other defendants, relying upon *Colorado River Water Conservancy District v. United States*, 424 U.S. 800 (1976), moved to dismiss this suit in favor of the subsequently-initiated state adjudicatory proceeding. After a hearing, the district court implicitly denied the motion when it entered a pretrial order governing further proceedings in the case. Among other things, the pretrial order recited that the State of Oregon was being made a party solely in its proprietary capacity as an owner of lands within the litigation area and that the judgment would not bind state officials as to decisions to be made in their official capacities. It was also stated that the judgment would not adjudicate the rights of downstream claimants or other nonparties. Finally, the order provided that, following entry of a declaratory decree, the State "will administer the adjudication, quantification, enforcement, and filing of water rights in accordance with its regular, normal, and on-going process and authority under applicable statutes, and consistent with the decree entered herein."

On September 27, 1979, the district court entered an opinion declaring the rights of the parties (Pet. App. 1-36). First, the court held that Article I of the 1864 Treaty confirmed an implied right to as much water as is necessary to fulfill the hunting, fishing and gathering rights recognized by that provision, with a time immemorial priority date, and that all of those rights continue to exist (Pet. App. 19-25, 34). Second, the court ruled that Articles II-V of the Treaty, which encourage the adoption of agriculture and contemplate individual allotments, impliedly create an additional tribal water right and

that when parcels were allotted to individual Indians, the allottees and their Indian successors acquired a portion of that water right, with an 1864 priority date (Pet. App. 22-23, 34). The court further held that, should a conflict arise, the Article I water rights prevail over the agricultural treaty water rights (Pet. App. 23). As to the water rights of non-Indian purchasers of allotted lands, the district court declared that a non-Indian successor to an Indian allottee acquires an appurtenant water right to water for the actual acreage under irrigation at the time he acquires title, plus such additional lands as he may with reasonable diligence place under cultivation, all with an 1864 priority date (Pet. App. 28-32, 34-35).⁵

4. The court of appeals affirmed (Pet. App. 37-95). At the outset of its discussion (Pet. App. 46-56), the court considered whether this Court's intervening decision in *Arizona v. San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), coupled with *Colorado River Water Conservation District v. United States*, *supra*, mandate dismissal of the federal suit in favor of the state proceedings. The court of appeals concluded that they do not.

First, the Ninth Circuit observed (Pet. App. 47-49) that in both *San Carlos Apache Tribe* and *Colo-*

⁵ The district court declined to rule upon the United States' claims regarding its water rights for its wildlife refuge and national forest lands within the boundaries of the former Klamath Reservation (Pet. App. 25-26). The court also declined to reach certain issues asserted by the State and individual defendants (Pet. App. 33-35). As to national forest lands outside of the former reservation, the court held that the government's reserved rights were limited to such waters as were unappropriated when the forest lands were reserved and which are essential for timber production and conservation of water flow (Pet. App. 26-28, 34).

rado River this Court expressly stated that the McCarran Amendment did not deprive the federal district courts of jurisdiction to adjudicate the water rights of the United States. Second, relying upon *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 664 (1978), the court of appeals found (Pet. App. 48-49) that its review of the district court's ruling on the dismissal motion was to be governed by the "abuse of discretion" standard.

Turning next to a detailed consideration of the district court's ruling in light of *San Carlos Apache Tribe* and *Colorado River*, the court held that "on the facts of this case, the district court did not abuse its discretion by proceeding to decide, rather than dismiss, the federal law questions presented to it by the United States' suit." (Pet. App. 50.) The court first observed that the notice initiating the state administrative proceeding was not issued until after the federal suit had been commenced (Pet. App. 51-52). The court then noted (Pet. App. 52) that even by the date of its opinion, more than seven years after publication of the State's notice, the state determination had not proceeded beyond the initial administrative investigation and that the information-gathering stage was still in progress. It was stressed (Pet. App. 53) that the district court, after consideration of voluminous briefs and an extensive record, had carefully tailored its exercise of jurisdiction to decide only the priority among water rights created by federal law and had left all other matters, including quantification of the federally-derived rights, to be determined by the state forum. Neither the policies of the McCarran Amendment nor the interests of wise judicial administration, the court held (Pet. App. 53-54), would be served by now set-

ting aside the district court's decision and directing the parties to begin anew in state proceedings.

In all the circumstances, the court of appeals concluded that the district court had not abused its discretion by declining to dismiss the case. The court of appeals then affirmed the district court on all of the substantive issues.*

ARGUMENT

As its opinion demonstrates, the court of appeals faithfully adhered to the standards established by this Court in *San Carlos Apache Tribe* and *Colorado River* when it determined that, under the particular facts of this case, the district court was not required to grant the motion to dismiss. The decision of the court of appeals is correct and presents no issue of general importance warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

In *San Carlos Apache Tribe*, this Court held that the McCarran Amendment usually requires that a federal water suit be dismissed or stayed in favor of prior or concurrent and adequate state adjudications. But that is not the inevitable result (slip op. 22). As the court of appeals correctly observed, the particular circumstances of this case support retention of federal district court jurisdiction under the standards announced by this Court in *San Carlos*.

First, in *San Carlos Apache Tribe* and *Colorado River*, this Court found it significant that the States

* The court also ruled (Pet. App. 77-81) that the Indians' hunting and fishing treaty water rights could not be converted into government reserved water rights for the national wildlife refuge and the national forest with the 1864 priority date. The district court had declined to reach this issue, see page 6, note 5, *supra*, and no party raised the issue on appeal.

of Montana, Arizona, and Colorado had demonstrated, through the enactment of new legislation or the maintenance of prior comprehensive judicial proceedings, a firm commitment to proceed with a timely resolution of water rights controversies throughout those states. *San Carlos Apache Tribe*, slip op. 7-8, 10-11; *Colorado River*, 424 U.S. at 804-805, 819-820. Here, in contrast, Oregon has not yet made any commitment similar to that of Arizona, Colorado or Montana. Rather, the State Water Resources Director merely served notice that he was commencing an "investigation" of the Klamath River and its tributaries pursuant to Or. Rev. Stat. § 539.020 (1981). Now, more than eight years later, that investigation has not been completed. Even when it is completed, there will still be no assurance that the Director will follow through and make a comprehensive adjudication. Oregon law does not require the Director to make a final determination; rather, Or. Rev. Stat. § 539.020 provides that he shall make a determination if "upon investigation he finds the facts and conditions justify it." And only after a conclusion of the "investigation" and a decision by the Director to go forward are the parties required actually to file their statement of claims and does the case proceed to an administrative hearing which may ultimately culminate in an administrative decision subject to judicial review.⁷ See Or. Rev. Stat. § 539.030.539.130.

⁷ It is questionable whether the state proceeding has yet matured into an adjudication within the meaning of the McCarran Amendment. The McCarran Amendment, like this Court's opinions in *San Carlos Apache Tribe* and *Colorado River*, speaks in terms of "suit[s]" in state "court[s]." Not only have no judicial proceedings yet been commenced here, but even the actual administrative adjudication has not yet begun. As described above, at this point the State Director

Second, in *San Carlos Apache Tribe*, this Court sustained the dismissal of the federal actions because, in part, of a concern that "the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issue first—a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum" (slip op. 20). Here, however, given the nature of the state administrative proceedings as just described, the potential for such a destructive race was virtually nonexistent. The federal courts below clearly did not race to judgment but, instead, thoroughly considered the issues upon extensive briefings and entered carefully reasoned decisions.⁸ The Director, in turn, as already noted, has proceeded in a far less expeditious manner.⁹ Under these circumstances, fears of a "destructive race" in this particular case have no basis in fact.

has only announced that he is conducting an investigation which may (or may not) eventually lead to an administrative adjudication, followed by possible judicial confirmation.

⁸ Petitioner does not seek review of any of the court of appeals' substantive rulings.

⁹ Although the McCarran Amendment, which gave the consent of the United States to be sued in state courts for an adjudication of its water rights, was enacted in 1952, the Director did not issue his notice until after this action was commenced in federal court in 1975. Petitioner's assertion (Pet. 6) that the Klamath Termination Act barred state adjudication of the federally-based rights at issue here until 1976 is simply incorrect. The Termination Act contains no provision barring a state adjudication pursuant to the McCarran Amendment and *San Carlos Apache Tribe* and *Colorado River* establish that Indian water rights may be adjudicated in state court under that statute.

Finally, as the court of appeals aptly noted (Pet. App. 53-54), "neither the policies of the McCarran Amendment, nor the interest[s] of wise judicial administration would be served by a decision * * * reversing and vacating the district court's judgment without reaching the merits." Here, the federal district court carefully confined itself to declaring the relative priorities of federally-derived water rights in a novel and virtually unique setting—that of a former federal Indian reservation—and left all other matters, including the actual quantification of the federally-derived rights, to be resolved in an appropriate state forum. At this late date, it would be extremely wasteful to vacate the limited ruling of the federal court and require relitigation of the issue, at some indeterminate future time, before a state tribunal. This Court has now reaffirmed the jurisdictional rules without ambiguity in *San Carlos Apache Tribe*. Even if (contrary to our primary submission) those rules would have justified abstention by the district court in the present case a decade ago, that does not warrant this Court's intervention today. In this instance, the law is well served by leaving well enough alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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